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No. 84-648

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SEDIMA, S.P.R.L.,
Petitioner,
- v. -
IMREX COMPANY, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CITIES OF NEW YORK, CHICAGO AND PHILADELPHIA, AMICI CURIAE

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BRIEF OF THE CITIES OF NEW YORK, CHICAGO, AND PHILADELPHIA, AMICI CURIAE

INTEREST OF AMICI CURIAE

The Cities of New York, Chicago and Philadelphia ("the Cities") submit this amici curiae brief in support of the positions of the petitioner in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984). This decision threatens the vitality and effectiveness of a statutory remedy used by the Cities and other local or state governments to combat systematic fraud and governmental corruption.

Local law charges each of the Cities with the

responsibility of representing and protecting the public interest and the rights of its citizens. Each of the Cities is also charged with the institutional responsibility of protecting its capability for delivering honest, efficient, impartial and effective governmental services to all its citizens. See New York City Charter § 394; 1970 Illinois Constitution, Art. VII, § 6; City of Philadelphia Home Rule Charter § 4-400.

In fulfilling its obligations, each of the Cities, as well as other localities, must confront the persistent challenges and dangers, as well as the corrupting influence, posed by systematic criminal frauds. Tax evasion or public contractor frauds cause massive economic loss to cities. Bribery and kickback schemes injure the public fisc and impair the integrity of government. Public benefits programs are repeatedly targeted by malefactors who defraud the government and the intended beneficiaries. Organized drug trafficking and arson for profit schemes create extraordinary demands on police and other governmental services and diminish

the quality of life in cities.

These criminal activities are often accomplished through sophisticated means, by criminal enterprises which systematically commit multiple criminal acts. Ordinary civil and criminal remedies available to penalize specific criminal acts and offer recompense to cities are insufficient to eradicate the widespread problems caused by the systematic misconduct of criminal enterprises. Extraordinary remedies are needed.

The Cities have found that the civil remedy provision in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), is an effective weapon for deterring these various criminal schemes and protecting the public interest, the public fisc and the institutions of local government.* Specifically, the Cities have

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* The Cities' view is shared by commentators. See Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983); Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

employed the civil remedy provision in RICO to attack fraudulent tax evasion, bribery and illegal bidding schemes.* In City of New York v. Arnmart

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* Civil RICO actions have also been employed by or on behalf of state or other local governments to recover the loss flowing from complex and far-reaching frauds, often accompanied by bribery or some other form of corruption. See New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y., filed December 21, 1983) (bribery and overcharges in connection with toxic waste disposal contract); County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981) (bribery and bid rigging in connection with sewer construction project); Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983) (taxpayers' civil RICO action arising from political slush fund payoffs, kickbacks, and money laundering scheme); Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir. 1984) (bribery and fraudulent billing by office supply company); Gerace v. Utica Veal Co., 580 F.Supp. 1465 (N.D.N.Y. 1984) (fraudulent underreporting by stockyard of weight and grade of ranchers' livestock, causing higher reimbursement payments to ranchers by state); County of Cook v. Lynch, 560 F.Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); Muncipality of Anchorage v. Hitachi Cable, Ltd., 547 F.Supp. 533 (D. Alaska 1982) (bribery and bid rigging in connection with telephone cable contracts); Maryland v. Buzz Berg Wrecking Co., 496 F.Supp. 245 (D.Md. 1980) (bid rigging and bribery in connection with demolition work for urban renewal project).

Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983), New York sued eleven beer distributors and their principal officers for their participation in an elaborate series of schemes — described in greater detail, infra — to evade the City's beer excise and general corporation taxes. In City of New York v. Liberman, Index No. 40339/85 (Supreme Court of New York, filed February 8, 1985), the City of New York sued its former chief lease negotiator due to his participation in a scheme to defraud the City in connection with the City's leases of various properties. In City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., settled March 12, 1984), New York sued the operators of a group of massage parlors who systematically laundered their revenues, committed bribery and evaded City taxes. In City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24, 1981), New York sued a fuel oil company and its principal officer for the

damages flowing from a fraudulent bidding and overbilling scheme. In City of Chicago v. North Austin Revitalization Corp., No. 85C-0441 (N.D. Ill., filed Jan. 18, 1985), the City of Chicago sued one of its former attorneys for using his position in the City Law Department to allow a corporation in which he was an officer and employee to reap excess profits from participation in a public housing program which funded the purchase, rehabititation and sale of abandoned buildings. In City of Philadelphia v. Modern Transportation, Inc., 84 Civ. 2052 (E.D.Pa., settled Feb. 13, 1985), the City of Philadelphia sued eleven corporations due to their participation in an intricate scheme to defraud the City in connection with sludge removal contracts. In addition, the Cities have explored the possibility of civil RICO actions to recover the losses arising from extraordinary demands on local governmental services and diminution of the quality of life caused by the systematic misconduct of criminal

enterprises.*

SUMMARY OF ARGUMENT

The Second Circuit departs from principled analysis of the RICO statute in creating the prior conviction and racketeering injury requirements in Sedima.** There is no basis in the language or the policy of the statute for the prior conviction and racketeering injury requirements created by the Second Circuit. The Second Circuit read into the statute requirements which simply do not appear there.

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* Compare City of Milwaukee v. Hansen, Civ. No. 77-246, slip op. at 3-4 (E.D. Wis. Jan. 13, 1981) (arsonists liable for treble the cost of fighting fires).

** The Second Circuit followed this inappropriate course apparently because of its dissatisfaction that RICO has "led to claims against such respected 'enterprises' as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch." Sedima, supra, 741 F.2d at 487.

POINT I

THE PRIOR CONVICTION REQUIREMENT SHOULD BE REJECTED.

The prior conviction requirement created in Sedima, supra, 741 F.2d at 496-504, has no basis in the RICO statute. There is no ambiguity in the statute — it plainly and clearly does not require prior convictions. In light of this clear language, virtually every court which has considered the issue has rejected the argument that prior convictions are required.* The Second Circuit's criticism in

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* See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1286-87 (7th Cir. 1983); USACO Coal Corp. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982); United States v. Cappetto, 502 F.2d 1351, 1356-57 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); In re Longhorn Securities Litigation, 573 F.Supp. 255, 270-71 (W.D. Okla. 1983); Barker v. Underwriters at Lloyd's, London, 564 F.Supp. 352, 356 (E.D. Mich. 1983); Mauriber v. Shearson /American Express, Inc., 546 F.Supp. 391, 396 (S.D.N.Y. 1982); State Farm Fire & Cas. Co. v. Estate of Caton, 540 F.Supp. 673, 675-76 (N.D. Ind. 1982); Parnes v. Heinold Commodities, Inc., 487 F.Supp. 645, 646-47 (N.D. Ill. 1980); Farmers Bank v. Bell Mortgage Corp., 452 F.Supp. 1278, 1280 (D. Del. 1978). See also Moss v. Morgan Stanley, Inc., 719 F.2d 5, 19 n.15 (2d Cir. 1983), cert. denied, sub nom. Moss v. Newman, 104 S.Ct.
(foonote continues on next page)

Sedima, supra, 741 F.2d at 496-98, that these decisions are poorly reasoned because they contain little discussion of this argument, ignores the obvious explanation that little discussion is necessary — no requirement of prior convictions appears in the statute.

The analysis by which the Second Circuit imposed a prior conviction requirement in civil RICO actions is flawed. There is no ambiguity in the definition of the predicate acts as certain acts "indictable" under federal law, "chargeable" under state law, or constituting "offense[s]" under federal securities, bankruptcy or drug laws. See 18 U.S.C. § 1961(1). This language means only that the elements of these state or federal crimes are the elements of the predicate acts in a civil RICO

(footnote from previous page)
1280 (1984).

Only two known reported opinions uphold (in dicta) such a requirement. See Van Schaick v. Church of Scientology, 535 F.Supp. 1125, 1137 n.12 (D. Mass. 1982) and Kleiner v. First Nat'l Bank, 526 F.Supp. 1019, 1022 n.2 (N.D. Ga. 1981), overruled on other grounds, Morosani v. First Nat'l Bank, 703 F.2d 1220 (11th Cir. 1983).

action. There is nothing in the statutory language which requires a conviction for the predicate acts. Similarly, there is no ambiguity in the fact that the RICO civil remedy may only be invoked where a "violation" of RICO has occurred. See 18 U.S.C. § 1964(c). There is nothing in the word "violation" necessarily or even implicitly incorporating a prior conviction requirement.

This straightforward analysis of the language of the statute should be sufficient to require rejection of the prior conviction argument, since the RICO statute, like any statute, should be interpreted according to its plain meaning. Russello v. United States, 104 S. Ct. 296, 299 (1983); United States v. Turkette, 452 U.S. 576, 580 (1981). Only in a limited class of cases, where there is "clear evidence" of a contrary legislative intent, will this rule not be applied. United States v. Apfelbaum, 445 U.S. 115, 121 (1980).

There is no legislative history regarding a doctrine which Congress neither considered nor adopted as part of the statute. The Second Circuit

filled this void by stating a "plausible" view — its view — of the intent Congress would have had and of the language Congress would have used had it considered the issue. See Sedima, supra, 741 F.2d at 498, 500-01, 503.* The very least of the criticisms which may be made of this result-oriented analysis is that it most certainly is not "clear evidence" of a legislative intent inconsistent with the plain language of RICO — which contains no prior conviction requirement.**

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* The Second Circuit suggested that since the predicate acts "speak along criminal rather than civil lines," the civil RICO remedy applies only to conduct already determined to be criminal. See Sedima, supra, 741 F.2d at 499-501. This analysis ignored that "Congress may impose both a criminal and civil sanction in respect to the same act or omission," United States v. One Assortment of 89 Firearms, 52 U.S.L.W. 4228, 4231 (Feb. 22, 1984); United States v. Ward, 448 U.S. 242, 250 (1980), and create a statutory scheme in which either sanction may be pursued completely independently of the other.

** The Second Circuit justified its creation of a prior conviction requirement by its view that such a holding avoided the necessity of determining whether the constitutional protections of the criminal law are applicable in a civil RICO action. (footnote continues on next page)

The prior conviction requirement will bar many actions contemplated by Congress when it enacted the civil remedy provision in RICO. The prior conviction requirement makes local and state government civil RICO suits subject both to a prosecutor's prior exercise of discretion to

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See Sedima, supra, 741 F.2d at 500 n.49. This justification is flawed in two crucial respects. First, enhanced procedural protections, such as those available to criminal defendants, are not required in proceedings in connection with a statute expressly denominated as civil unless the statute is so punitive in purpose or effect as to negate the appropriateness of the "civil" label. See United States v. One Assortment of 89 Firearms, 52 U.S.L.W. 4228, 4230-31 (Feb. 22, 1984); United States v. Ward, 448 U.S. 242, 248-49 (1980). The civil treble damages remedy created in the RICO statute is primarily remedial and compensatory, as demonstrated by Judge Cardamone in his dissenting opinion in Sedima, supra, 741 F.2d at 506-08; therefore, civil RICO defendants have no constitutional entitlement to the enhanced procedural protections of the criminal law. Moreover, the Second Circuit's perceived need to avoid this question is simply inconsistent with the analysis of the Supreme Court in 89 Firearms, Ward, and other similar cases in which the Supreme Court has chosen not a course of "avoidance" through strained statutory construction, but instead has forthrightly determined whether or not the claimed constitutional procedural protections are applicable.

commence a criminal action, and to the prosecutor's prior success in the criminal action. Thus, the prior conviction requirement deprives local and state governments of independent use of an effective civil remedy against corruption, large-scale frauds and other broad-based criminal schemes.

It is unfortunately all too easy to chart the disastrous effect which the prior conviction requirement will have on meritorious civil RICO suits. For example, in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, eleven beer distributing companies evaded excise taxes on wholesale beer purchased in New York City by fraudulently representing sales of beer to be sales of soda; laundering beer sales through fictitious purchasers residing outside the City; engaging in off-the-books cash transactions; filing fraudulent tax returns; and failing to file tax returns. This is the kind of systematic criminal scheme which RICO was designed to eliminate. The City of New York decided to bring a civil RICO treble damages action since treble damages would be most effective as a

deterrent and as a means of recovering losses.* Five of the companies settled their liability with New York City. Because there were no prior convictions, however, the remaining perpetrators of these schemes will totally escape civil liability under RICO — if the prior conviction requirement created in Sedima is not overruled.

Similarly, the prior conviction requirement has created an artificial and anomalous obstacle to the City of New York's full employment of the civil remedy in RICO in City of New York v. Liberman, supra. In that case, New York City's former chief lease negotiator and a number of landlords were involved in a bribery scheme which defrauded New York City in connection with the lease of space for public agencies. The federal government decided to focus a criminal prosecution on Mr. Liberman, and

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* Referring a case to a criminal prosecutor does not guarantee that there will be a criminal prosecution, since the decision to do so is then within the prosecutor's discretion. Prosecutorial priorities may differ from a city's priorities, and prosecutorial resources are limited.

obtained a guilty plea from Mr. Liberman to a criminal RICO violation based on, inter alia, bribe receiving. The City of New York decided to target not only Mr. Liberman, but also his fellow wrongdoers — the landlords and various persons who acted as intermediaries to launder the payoffs —and sued all of them in state court under various common law theories less far-reaching and effective than RICO. The City of New York also included a civil RICO claim against Mr. Liberman in this action. But the landlords could not be sued under the civil RICO statute due to the Sedima prior conviction requirement. Such a result is anomalous — the City could sue the bribe-taker under civil RICO, but not the bribe-giver.

These illustrations demonstrate that the prior conviction requirement created in Sedima destroys the efficacy of the civil remedy provision in RICO and consequently the ability of local and state governments to vindicate the public interest by means of that statute.

POINT II

THE RACKETEERING INJURY REQUIREMENT SHOULD BE REJECTED.

There is no basis in the RICO statute for a special "racketeering injury" requirement. A fair reading of Section 1964(c) of RICO, which gives proper attention to Congress' purpose in enacting RICO, is inconsistent with the Second Circuit's opinion in Sedima, supra, 741 F.2d at 494-96, in which just such a requirement was created.

The purpose of RICO — the elimination of organized criminalty, see United States v. Turkette, supra, 452 U.S. at 591 — mandates a broad construction of Section 1964(c), unfettered by any "racketeering injury" requirement. Congress prohibited the commission of organized criminality, as defined in RICO, rather than proscribe "organized crime" per se because "organized crime" is a functional concept which cannot be defined in any principled, legally satisfactory way. See 116 Cong. Rec. 35,344 (1970) (remarks of Congressman Poff). Thus, Congress created a broad remedy

addressed to the kind of misconduct most often engaged in by organized criminals, but which would reach beyond the shadowy boundaries of the organized crime community and apply to anyone engaging in the misconduct. See id.; 116 Cong. Rec. 18,945 (1970) (remarks of Senator McClellan); United States v. Turkette, supra, 452 U.S. at 588-90; Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984).

The Second Circuit undermined Congress' purpose by imposing on the civil remedy provision a racketeering injury requirement. The showing necessary to demonstrate a racketeering injury, which according to the Second Circuit consists of an "injury different in kind from that occurring as a result of the predicate acts themselves," Sedima, supra, 741 F.2d at 496, is a practical impossibility

except in rare cases.* See In re Catanella, 583 F.Supp. 1388, 1436-37 (E.D.Pa. 1984); Ralston v. Capper, 569 F.Supp. 1575, 1580 (E.D. Mich. 1983).

Moreover, the Second Circuit's limitation of the kind of activity which RICO was designed to

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* The Second Circuit's analysis in Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984), a companion case to Sedima, of how the civil remedy provision in RICO would apply in a case of arson for profit demonstrates that the "distinct RICO injury" requirement deprives the civil remedy provision in RICO of any practical significance. In Bankers Trust, supra, 741 F.2d at 517, the Second Circuit stated that an example of a "distinct RICO injury" could be found where a victim of multiple arsons was denied fire insurance and thereafter was unable to obtain reimbursement for innocent fire damage (e.g., destruction caused by lightning). In contrast, the Second Circuit seemed to indicate that the victim of repeated arsons could not sue the arsonist for fire damage directly resulting from fires set by the arsonist. Plainly, such analysis destroys the effectiveness of the civil remedy provision in RICO as a method for combatting crime, and erodes the doctrine established in City of Milwaukee v. Hansen, supra, that the damage directly resulting from arson — in that case, municipal fire-fighting costs — is compensable in a civil RICO suit. The Bankers Trust analysis undermines the purposes of the civil remedy provision in RICO — augmented compensation to the victim for all of its losses resulting from the criminal scheme, and the economic destruction of the criminal enterprise.

deter to "systemic harm to competition and the market" caused by "mobsters", Sedima, supra, 741 F.2d at 495-96, is not supported by reasoned or principled analysis. The "mobster" requirement is a resurrection of the discredited "organized crime" requirement rejected by most courts which have considered it, see, e.g., Bennett v. Berg, 685 F.2d 1053, 1063, aff'd en banc in pertinent part, 710 F.2d 1361, 1364 (8th Cir. 1982), cert. denied, 104 S. Ct. 527 (1983), including a panel of the Second Circuit in a recent decision, Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 21 & n.17. The mobster requirement is either so vague or so limited as to impose an insuperable obstacle to success in a civil RICO suit. For example, the intricate tax-evasion schemes of the beer distributors in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, certainly constituted organized criminality; but it is not so clear that the beer distributors were "mobsters," as that term is used in common parlance. The vagueness of the term "mobster" — if

it is a required element in a civil RICO action — would make proof of this element a practical impossibility, and would eliminate RICO liability for categories of malefactors certainly intended by Congress to fall within the reach of RICO.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED.

February 28, 1985.

Respectfully submitted,

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